

Approved 3/5/08

TOWN OF CUSHING
PLANNING BOARD
Minutes of Meeting
February 6, 2008

Board Present: Chairman Dan Remian, David Cobey, Bob Ellis, Evelyn Kalloch, Frank Muddle, CEO Scott Bickford and Secretary Deborah Sealey

Board Absent: None

1. Call to Order: Chairman Remian called the meeting to order at 6:00 P.M. and took a roll call.

2. Approve the Minutes of 11/7/07, 12/5/07 and 1/2/08: Board members asked for minor corrections to each set of minutes.

ACTION: Mr. Cobey made a motion, seconded by Mrs. Kalloch, to accept the minutes of 11/7/07 as amended.
Carried 5-0-0

ACTION: Mr. Ellis made a motion, seconded by Mrs. Kalloch, to accept the 12/5/07 meeting minutes as amended.
Carried 5-0-0

ACTION: Mrs. Kalloch made a motion, seconded by Mr. Cobey, to approve the 1/2/08 meeting minutes as amended.
Carried 5-0-0

Mr. Muddle said there was a part of the minutes that did not make the draft. He said that it occurred after the first review and before the PB started Item #5 (Page 4). Mr. Muddle stated that he had commented to Mr. Tower that, "In the ultimate review of this application there was a line dispute on the border area on the north side of this project with the abutter and without that being resolved it left a question in the Board's mind as to recognizing the ownership of the property being developed and could be a deficit to the approval, or at least the conditions, and urged that that be resolved before any final action so that that wouldn't upset the go-ahead with approval." Mr. Tower said he recalled the statement Mr. Muddle referred to and thought it was made to him after the meeting adjourned. Mr. Remian and Mr. Muddle both said it happened during the meeting.

3. Correspondence: The chairman read into the record several pieces of correspondence, as follows:

- 1) A 1/15/08 letter from Engineering Dynamics Inc., as well as Mr. Remian's response
- 2) A 1/24/08 letter from Mr. Remian to Mr. Tower
- 3) A 1/17/08 letter from Cushing Holdings, LLC, requesting a written response from the PB's attorneys concerning Mr. Goodall's charge of bias on the part of two PB members. Mr. Remian said the PB's attorney had said a written response was not warranted and the Board had acted properly in dealing with the issue. Furthermore, Mr. Remian reported that PB attorney Bragg had spoken with attorney Goodall about recent outbursts, as well as a written and documented pattern of intimidation and abuse [by the applicant].
- 4) A 1/18/08 letter from Cushing Holdings, LLC, about requested changes to the town's RP zone drawings. Mr. Remian said the Board had not received the drawings. Mr. Tower said he would provide them again and then reviewed the history of these drawings.
- 5) A 1/23/08 letter from Engineering Dynamics, Inc., asking that an amendment to the Robbins Mountain Subdivision [RMS] be placed on the agenda.
- 6) A 1/29/08 letter to Mr. Tower from Mr. Remian, explaining why the RMS amendment and an additional packet of drawings for Gaunt Neck Subdivision were not placed on the 2/8/08 agenda.
- 7) A 1/30/08 letter from Cushing Holdings, LLC, requesting copies of correspondence to the PB identified at the January meeting. Mr. Remian said no one on the Board recalled this request and promised to provide the copies promptly.
- 8) A 1/30/08 letter from Cushing Holdings, LLC, saying it should not have to pay a review fee for amended materials for RMS and to protest not having its requested item on the February agenda.

- 9) A 2/1/08 letter from Mr. Tower's attorney, Clifford Goodall, stating that RMS had been in a "preliminary" and "pending" state at the time of Cushing's adoption of amendments to its subdivision regulations. Thus, he said, the submitted amendments must be accepted for that review tonight. Mr. Remian provided a verbal rebuttal of several of Mr. Goodall's claims, stressing that the application in question had been in "substantive" review for several months and was not preliminary. The chairman said attorneys Bragg and Cunningham had said the amendment did not have to be included in the RMS application review, which should be approved, approved with conditions or denied before any further amendments were considered. Mr. Tower said this legal opinion was merely "hearsay" because it was not in writing.

Mr. Tower said that some of the deficiencies of the Gaunt Neck Subdivision amendment that Mr. Remian listed in his letter were not correct. He said it had been alleged that he had violated the Shoreland Zone Ordinance [SZO] and not the Subdivision Regulations [SR] and stated that an actual violation of the SR was required in order to exclude a subdivision application from review. The developer then said that the town's attorney had consistently said he would defend (and not that he would "win") the PB on that point, which had resulted in the town's enormous legal bills over the last couple of years. For that reason, he said the PB should consider carefully the words its legal counsel gave them. Mr. Tower then said that Chairman Remian's position allowed him to make decisions, such as what items would be on the agenda, and charged that he consistently made those decisions in a way unfavorable to the applicant. Mr. Remian asked him to explain that statement for the record.

Mr. Tower replied that the statements the chairman had made tonight had been unfavorable to the applicant. He said he was not afraid to put his position in writing and thought the town should do the same. Mr. Remian replied that he had told Mr. Bragg that he did not want anything in writing, in order to save money, unless he had the approval of the Selectmen. CEO Bickford said the applicant would have the minutes of tonight's meeting, which would serve as a written record of the PB's opinion. Mr. Tower responded by saying the PB was trying to rely on what it claimed was a legal opinion, when it did not have a legal opinion. Mr. Remian said that was up to the Board to decide.

4. Continuation of Application for Robbins Mountain Subdivision Presented by Mr. Tower, Map 6, Lots 83 & 84: Mr. Muddle said this application had been delayed until certain information was received, at which time the PB would pick up the review as soon as possible. That decision had been made 3 to 4 months ago and he understood no additional submissions had come in. Chairman Remian asked the Board what it wanted to do. Mr. Muddle said they had been looking at storm water at that time and awaiting DEP approval. Mr. Remian added that they were also concerned with how clearing of trees would affect storm water. Mr. Muddle said that, at that time, the review had been tabled until the DEP approved Mr. Tower's storm water management plan. Mrs. Kalloch noted an 8/14/06 letter from Emery & Garrett detailing an abutter's concern about the storm water filtration ponds. Mr. Ellis said that in a prior meeting there had been correspondence with the DEP concerning discrepancies in the tree cover and septic plume issues. Finally, Mr. Remian mentioned the issue about the border with Mr. Cardon's land raised at the last meeting. Mr. Muddle concluded by saying none of these issues had been resolved.

Abutter Patrick Cardon said a new deed had been submitted to the town and he would like to read a statement. Mr. Tower asked if the PB was putting itself in a position where it would make a judgment. Mr. Remian replied in the negative. Mr. Tower said that made any input from Mr. Cardon irrelevant. Mr. Cardone then read into the record a statement dated 2/6/08. This statement was accompanied by a copy of a deed from Jacob Bedell to Last Resort Holdings, LLC, dated 1/22/08. Mr. Cardon claimed that Mr. Tower was applying for permission to develop land that he did not own, but Mr. Cardon did. He asked that the PB not approve the RMS application until the developer could disprove Mr. Cardon's substantive evidence that he owned some of the land included in it.

Mr. Cobey, an architect, said that he had some understanding of survey lines and presented a sketch illustrating the relationship of the boundary lines claimed by Tower and Cardon. He said he had also shown what happened when the Yarumian line was laid out from the two surveys. He said he thought the PB would be remiss to make future lot owners in RMS inherit this problem by approving the present plan. He said Mr. Tower had been aware of this conflict for a year and had not resolved it by proving he had right, title and interest in all of the property. Mr. Muddle said it was not the Board's role to get involved in the facts of this dispute, but to be aware that there was a dispute over the property boundaries. He said Mr. Cobey had made it clear that there was a serious question as to the difference between the two parties. Furthermore, the SR required submission of proof of

property boundaries. CEO Bickford said this was a civil issue and could be conditional if the Board approved the plan.

Mr. Tower said the information from Mr. Cobey was essentially something that resembled expert testimony, which Mr. Cobey was not qualified to make in this matter. He said this was a civil matter and he had agreed to meet with Mr. Cardon to resolve this. He stated that his attorney, Wayne Crandall, had told the PB at a previous meeting that it was required to accept whatever evidence was presented and rely upon that in making its decision. He claimed the Board had agreed with that opinion at the time. Mr. Remian replied that Mr. Cobey had not presented expert testimony but had simply shared with the Board his understanding of information that had been previously presented. Mr. Muddle repeated that this was a civil matter and could be handled as a condition. Mr. Tower said the Board had no right to make it a condition. Mr. Remian said Attorney Bragg had told him the Board had every right to take a further look if it felt there was any evidence that the right, title and interest was in question. Mr. Ellis said that Mr. Crandall's point referred to evidence submitted by both parties, which the PB should do in this case of conflicting submissions.

Mrs. Kalloch said that other items had not been forthcoming. Mr. Muddle said a question had been raised on Subsection 7.16 (Storm water), where the Board did not know if the plan was adequate because it had received nothing from the DEP. Mr. Remian said he would like to see the application denied or approved with conditions because it had been under review for so many months. Mr. Tower said it was the Board that had delayed approval by asking for the DEP approval. He said he had talked to the DEP's Becky Maddox today and she had said the order for RMS had been written and was being circulated for signatures; therefore, he asked that the application be tabled. Mrs. Kalloch said the Board still did not have the current financial report and the lots did not all include 40,000 Sq. Ft. of buildable area because of the storm water pools and road easements; since the PB had held other applications to the buildable area requirements, this one should be also. Mr. Tower countered that the Board had already made a finding of fact on lot size and read aloud Subsection 9.1(A), which he said required 40,000 Sq. Ft. in the lot, not in buildable area.

Mr. Muddle said also clouding the issue was the amended submission that would substantially change the application in terms of size and scope by adding seven lots. He thought a new application that consolidated the entire scope of the plan and answered the questions on storm water management, lot size, boundaries and financial capacity was required. He felt the application should not be approved at this point. Mr. Cobey agreed, saying the Board had accepted very vague and non-specific information regarding the applicant's financial capacity to undertake the project, which he felt was inadequate under the circumstances. Mr. Ellis said the Board had made a ruling on Subsection 7.10 (Financial and technical capacity) and needed to do that on Subsection 7.16 (Storm water). Mr. Cobey said the Board had agreed that a DEP storm water permit would meet the storm water requirements of the SR, but even that would not satisfy him because the reduction of forested area, which Mr. Tower refused to limit by covenant, would increase

Mr. Tower said the storm water management plan included all the information necessary to address Mr. Cobey's concerns and that simply changing the forest type did not mean it would be deforested. He said the Board needed to find someone to correctly interpret the documents. Mr. Muddle said he was depending upon the DEP approval, without which the Board had nothing. He said the issue needed to be resolved and, because of potential expansion in the future, the PB was barking up the wrong tree with this discussion. Mrs. Kalloch said she was prepared to make a motion because of storm water management, the boundary lines, the financial report, etc.

ACTION: Mrs. Kalloch made a motion, seconded by Mr. Cobey, to deny the application.
Motion tabled

Mr. Cobey said the Board should revote on 7.10 and 7.16 before voting on Mrs. Kalloch's motion. Mrs. Kalloch and he agreed to table their motion.

ACTION: Mr. Cobey made a motion, seconded by Mr. Kalloch, to revisit Article 7.10 (Financial and technical capacity).
Motion withdrawn

CEO Bickford suggested the Board consider carefully what it had already approved and pick any questions up in their final independent votes. Mr. Remian said he would like a motion to either deny or approve the application, after which each member would explain his vote. Mr. Tower said he could give an unequivocal statement that

there would be no new application, but an appeal, if this application was denied and if the town wanted to continue to spend money, so be it. Mr. Remian agreed he had the right to appeal under the town's regulations. Mr. Tower said he simply wanted to advise the Board the outcome of a decision to deny.

Mr. Cobey said the Board had not considered in any detail an approval with conditions, such as DEP approval, resolution of the north property line and financial capacity. Mr. Muddle said that was not appealing to him because of possible expansion in the future and the substantial changes to what they would be getting into with a conditional approval. Mr. Ellis said it did not appeal to him because he thought it not wise to put a boundary dispute in as a condition. Mr. Tower said he would like the Board to consider and vote on a couple of issues. The first was his request to table the application because the DEP permit was very close. Secondly, he wanted the Board to take a formal action to deny the expansion of the RMS application to allow the additional lots he had requested. Then, he said, the Board could decide where it would go. He then said he would like to reverse the order of his request. Mr. Muddle responded that there was no amendment application on the table to deny and Mr. Cobey said it was not the applicant's place to tell the Board what to do. Mr. Remian said the amendment packet that had been received had not been complete, Mr. Tower had been notified of that fact and it should not be discussed at this time. Mr. Tower said, "So your letter constitutes denial, is that what you're saying?" Mr. Remian said it did not because the application did not appear on the agenda for specific reasons. Mr. Tower declared that Mr. Remian's judgment and reasoning had been wrong.

ACTION: Mrs. Kalloch made a motion, seconded by Mr. Cobey, that because this had gone on so long and the Board did not have the documents and material requested, the application be denied.
Carried 5-0-0

Mr. Tower said the PB had been instrumental in creating the duration of the review of this application. He said the PB could not create the conditions and then use them as an excuse to take some action. Mr. Remian said this was for someone else to decide.

CEO Bickford said the Board had been talking about the denied amendment application and he had the submitted material on hand. He asked Mr. Tower to take them back so they would not become lost. Mr. Tower refused and Mr. Bickford said he had no reason to keep them

Though he said a unanimous vote required no statement of reasons, Mr. Remian asked the members to so state for the record.

Mr. Cobey said his concerns were the inadequacy of provisions for storm water management, the inadequacy of the statement of financial capacity and his conclusion that the applicant had not proved his right, title and interest in the property.

Mrs. Kalloch said her issues were the lack of a detailed financial report, the storm water management plan, clear-cutting, the 40,000 Sq. Ft. buildable lot size issue and the storm water filtration ponds. She described the boundary line as a major consideration.

Mr. Muddle said he was saddened and quite frustrated that the Board had reached this point after 18 or more months of review. He said he did not know if the storm water plan was correct or not and the fact that he couldn't find out raised a doubt in his mind that it was adequate. He thought the boundary question was a legal issue to be resolved. He felt the financial report was basic and more than a year old. The other question in his mind was the expansion of this project in the future, which could negate a lot of the information the Board was trying to get at this point.

Mr. Ellis said the issue of the border dispute needed to be resolved before an approval. He felt the DEP permit was necessary to decide on 7.16 and the Board had been told several times it would be received within 3 to 4 days.

Mr. Remian said the storm water permit had been an issue all along and had not been satisfied. The possibility of inadequate lot size, depending on how the boundary issue was resolved, was another question and the financial statement had always been inadequate, the chairman said.

5. Other Business: Mr. Muddle asked if there were any other applications from Mr. Tower. Mr. Remian replied that there were two; he and the CEO had found that one had no application form and neither included any of the

fees that went into effect this year. He said other applicants had paid their fees and they could not be waived for someone else. Mr. Bickford said he should not be responsible for Mr. Tower's incomplete paperwork and, if the applicant did not want it, the town should dispose of it. Mr. Tower took his paperwork.

6. Adjournment:

ACTION: Mr. Cobey made a motion, seconded by Mrs. Kalloch, to adjourn at 7:30 P.M.
Carried 5-0-0

Respectfully submitted,

Deborah E. Sealey
Recording Secretary